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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. [redacted]164

DONALD M. HILL, ET ALS.,
Petitioners,

v.

CHARLES S. SMITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF PETITION.

EDWARD E. BLODGETT,
IRVING F. CARPENTER,
GEORGE S. FULLER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 510

DONALD M. HILL, JAY R. BENTON AND GEORGE B. BILLINGS, EXECUTORS OF THE WILL OF WARREN M. HILL, PETITIONERS,

v.

CHARLES S. SMITH, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Donald M. Hill, Jay R. Benton and George B. Billings, Executors of the will of Warren M. Hill, respectfully petition this Court for a writ of certiorari to require that there be certified to this Court for review and determination the cause, the record of which remains in the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, numbered 79,103, wherein your Petitioners were the defendants and the Respondent was the plaintiff, and wherein final judgment has been entered pursuant to a decision of the Supreme Judicial Court for the said Commonwealth reported in Volume 232 of the Massachusetts Reports, page 188.

This action was brought by your Respondent in the

said Superior Court for the County of Suffolk and Commonwealth of Massachusetts by a writ dated March 30, 1914, on a judgment for $4,478 secured by him on the second day of May, 1904, against Warren M. Hill (your Petitioners' testator), late of Boston, Massachusetts. The cause of action upon which the judgment had been founded did not appear. The defendant's answer set up a discharge in bankruptcy ordered by the District Court of the United States for the District of Massachusetts on the third day of December, 1912, discharging the said Warren M. Hill from all provable debts and claims which existed on the twentieth day of June, 1912, on which day the petition for adjudication had been filed by him; excepting such debts as were by law excepted from the operation of a discharge in bankruptcy.

After the commencement of the suit and before the trial the said Warren M. Hill died (October 26, 1915) and your Petitioners were cited in by your Respondent (the original plaintiff) as defendants. Your Respondent having proved the judgment and that it remained unsatisfied, rested. Your Petitioners (the defendants) introduced in evidence a certified copy of the discharge in bankruptcy of the said Warren M. Hill and rested. Your Respondent (the plaintiff and judgment creditor) then introduced in evidence in rebuttal a certified copy of the schedule of creditors filed in the bankruptcy proceedings of said Warren M. Hill in which schedule the name of your Respondent, Charles S. Smith, did not appear. No evidence other than the foregoing was introduced by either party.

The Superior Court ruled, at the request of your Petitioners, as follows:—

(1) That the certified copy of the discharge in bankruptcy on the facts in this case was *prima facie* evidence that the plaintiff's (your Respondent's) debt was properly

scheduled and that the plaintiff was duly notified of the bankruptcy.

(2) That the burden was upon the plaintiff (your Respondent) to show that his debt or judgment was not scheduled according to law in the list of claims filed in the Bankruptcy Court prior to the discharge in bankruptcy.

(3) That in arriving at a finding in this case the Court must assume, unless by a preponderance of the evidence the plaintiff (your Respondent) had shown otherwise, that the bankruptcy proceedings of the defendant prior to and at the time of the adjudication of discharge were in all respects regular and in compliance with every requirement of the Bankruptcy Law.

(4) That the plaintiff's (your Respondent's) claim was a provable debt under the Bankruptcy Act.

Your Petitioners (the defendants) also requested the Superior Court to rule that the burden was upon the plaintiff to show that he was not notified of the proceedings in bankruptcy and that the burden was upon the plaintiff to show that he had no knowledge of the proceedings in bankruptcy. The Superior Court refused to make either of the foregoing rulings as requested and found for your Respondent (the original plaintiff) in the amount of $8,150.

The case was then taken to the Supreme Judicial Court for the Commonwealth of Massachusetts upon your Petitioners' exceptions to the finding of the Superior Court and to its refusals to rule as requested. The Supreme Judicial Court, however, overruled your Petitioners' exceptions and the case went back to the said Superior Court for the entry of final judgment.

Thereafter on the sixth day of June, 1921, final judgment was entered for your Respondent (the original plaintiff) in the said Superior Court for the County of Suffolk

pursuant to rescript from the Supreme Judicial Court for the Commonwealth of Massachusetts.

Your Petitioners are advised that the said judgment of the Superior Court for the County of Suffolk and Commonwealth of Massachusetts is final and erroneous and this Honorable Court should require the case to be certified to it for its review and determination.

The reasons relied on by your Petitioners for the issuance of said writ and upon which your Petitioners believe that this petition ought to be granted may be summarized as follows: —

First: — The Massachusetts Supreme Judicial Court in overruling your Petitioners' exceptions to the refusal of the Superior Court to rule that the burden was upon your Respondent (the original plaintiff and the creditor) to show that he was not notified and that he had no knowledge of the debtor's proceedings in bankruptcy, holds that a discharge in bankruptcy of the debtor having been proved and the creditor having proved that his name did not appear in the bankrupt's schedule of creditors, the burden was then cast upon the debtor to show that the creditor had notice or knowledge of the proceedings in bankruptcy. This is in conflict with the Bankruptcy Law, as construed by this Court, under which the burden is upon the creditor (the debtor's discharge in bankruptcy having been proved in defense to a provable debt) to show that the "debt sued on was by law excepted from the operation of the discharge".

Second: — The decision of the Massachusetts Supreme Judicial Court in overruling your Petitioners' exceptions to the finding and refusals to rule as requested and the rendering of final judgment by the Superior Court in favor of your Respondent (the original plaintiff) upon his claim, the claim being upon a judgment secured by him

in 1904 against your Petitioners' testator, and the only evidence before the said courts being (in addition to the proof of the judgment and that it remained unsatisfied) a certified copy of a discharge in bankruptcy of the judgment debtor granted in 1912 and a certified copy of the schedule of creditors filed in said bankruptcy proceedings in which schedule the name of your Respondent, Charles S. Smith, did not appear, were erroneous and in conflict with the Bankruptcy Law, as construed by this Court, and was a denial of the rights, privileges and immunities to which the debtor (your Petitioners' testator) was entitled under the said Bankruptcy Law.

Third: — The decision of the Massachusetts Supreme Judicial Court, which appears to be in conflict with the decisions of other State courts and with the decisions of this Court upon the question of the effect to be given to a discharge in bankruptcy, leaves debtors and creditors in doubt as to the effect on their liabilities and rights of a discharge in bankruptcy granted to the debtor under the Bankruptcy Law. In view of this conflict the existence of which has been recognized by this Court in the recent case of *Kreitlein* v. *Ferger,* 238 U. S. 21 at pages 30 and 31, it is in the interests of jurisprudence and uniformity of decisions that the questions raised by this case involving the construction and application of the Bankruptcy Law be finally determined by this Court.

Your Petitioners present, herewith, a certified copy of the entire record in the said cause including the opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Wherefore your Petitioners respectfully pray that a writ of certiorari be issued to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law and that the said decision of the

Supreme Judicial Court for the Commonwealth of Massachusetts and the judgment of the Superior Court for the County of Suffolk in said Commonwealth be reversed by this Honorable Court and that your Petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

DONALD M. HILL,
JAY R. BENTON AND
GEORGE B. BILLINGS,

EXECUTORS OF THE WILL OF WARREN M. HILL,
by their Counsel,

EDWARD E. BLODGETT.
IRVING F. CARPENTER.
GEORGE S. FULLER.

COMMONWEALTH OF MASSACHUSETTS.
COUNTY OF SUFFOLK, SS.

Edward E. Blodgett, being duly sworn, deposes and says that he is the counsel for the above-named Petitioners and that the matters in the foregoing petition are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me this first day of September, 1921.

[SEAL] NORMAN W. BINGHAM, JR., *Notary Public.*

I do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

EDWARD E. BLODGETT,
Counsel for the Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 510

DONALD M. HILL, JAY R. BENTON AND GEORGE B. BILLINGS, EXECUTORS OF THE WILL OF WARREN M. HILL, PETITIONERS.

v.

CHARLES S. SMITH, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A statement of facts is contained in the petition to which this brief is annexed. For clearness and convenience your Petitioners, whenever referred to herein, are called the debtor, and your Respondent the creditor. The italics throughout this brief are ours.

A.

AUTHORITY FOR THE ISSUANCE OF THE WRIT.

This case involves the construction of the Bankruptcy Law (so-called) — and particularly of Sections 17 and 21 f thereof, and the only question now raised is whether the Superior Court and the Supreme Judicial Court of Massachusetts gave the proper effect to the discharge in bankruptcy pleaded by the debtor (your Petitioners' testator). This clearly presents a Federal question.

Crawford v. *Burke*, 195 U. S. 176, 186.
Kreitlein v. *Ferger*, 238 U. S. 21.
Neal v. *Clark*, 95 U. S. 704.

This Federal question, *i. e.*, as to the proper effect to be given to a discharge in bankruptcy pleaded by the debtor, was raised both in the trial Court (Superior Court) and in the Supreme Judicial Court of Massachusetts. In the trial Court the debtor pleaded his discharge in bankruptcy as a bar to the creditor's claim and requested certain rulings as to the burden of proof based thereon, duly excepting to the refusal to give such rulings and to the finding for the creditor made by the said Court. And again before the Supreme Judicial Court the debtor raised the same question, and that Court considered and determined the Federal question thus involved, as appears from its opinion (232 Mass. 188) a copy of which is included in the transcript of the record.

This case is properly reviewable by this Court on a writ of certiorari for the reasons that the questions raised relate wholly to an alleged denial by the Superior Court and the Supreme Judicial Court of Massachusetts of certain rights, privileges or immunities asserted by the debtor under the Bankruptcy Law, and this petition may be properly allowed under Section 237 of the Judicial Code, Act of September 6, 1916, c. 448, 39 Stat. at Large 726.

Gratiot State Bank v. *Johnson*, 249 U. S. 246.
Chicago, Great Western R. R. v. *Basham*, 249 U. S. 164.
Andrews v. *Virginian Ry. Co.*, 248 U. S. 272.
N. Y. Central & Hudson River R. R. v. *York & Whitney Co.*, 41 Sup. Ct. Rep. 509.

The question raised in the case at Bar was expressly referred to in the *Kreitlein* case at pages 30–31 but was not passed upon, this Court saying with respect to it as

follows:— "The authorities, however, differ as to whether under Section 17 (3) the burden is on the plaintiff (the creditor) to show he had notice or on the bankrupt to show that the creditor had notice in time to have proved his claim and had it allowed."

B.

THE MASSACHUSETTS SUPREME COURT DID NOT GIVE THE PROPER EFFECT TO THE DEBTOR'S PLEA OF A DISCHARGE IN BANKRUPTCY.

I.

The decision of the Massachusetts Supreme Court apparently is based upon the theory that the burden of *proof* remained throughout upon the debtor to prove that the debt sued upon by the creditor came within the operation of his (the debtor's) discharge in bankruptcy and that the introduction in evidence of the debtor's discharge in bankruptcy was merely prima facie evidence in favor of the debtor to the effect that the creditor's claim has been discharged, which prima facie evidence merely shifted to the creditor the burden of evidence. Such a theory is fundamentally wrong.

A. Section 17 of the Bankruptcy Law (Act of July 1, 1898, c. 541, Stat. at L. 544) as amended by the Act of February 5, 1903, c. 487, 32 Stat. at L. 797 (this case arose prior to the Amendment of 1917) provided as follows:—

> "*Debts Not Affected by a Discharge.*
>
> Sec. 17a A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; . . ."

B. Section 21 f of the Bankruptcy Law provides as follows:

> " A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidenee of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."

C. A plea of a discharge in bankruptcy is a plea in bar.

21 Ruling Case Law, Pleading, Sec. 109 and cases cited.

D. It is not an unconscionable or odious defense to an action to recover a debt and has been referred to as being similar to the defense of the statute of limitations.

Citizen's Nat'l Bank v. *Branden,* 19 N. D. 489.

E. Such a plea shifts to the creditor, if he would avoid it, the burden of *proof.* The only burden of *proof* upon the debtor who has pleaded his discharge in bankruptcy is to prove that discharge. That burden is completely sustained by the introduction of a duly authenticated copy of the order for his discharge. The burden of *proof,* not merely the burden of evidence, is thereupon placed upon the creditor, if he would avoid the plea by any exception in the statute, to establish that he comes within that exception.

(1) Such is the clearly established doctrine where the statute of limitations is pleaded.

Piatt v. *Vattier,* 9 Pet. 405, 416.
Ross v. *Duval,* 13 Pet. 45.
Marsteller v. *M'Clean,* 7 Cranch, 156.
Pierce v. *Perry,* 189 Mass. 332.

(2) Such a doctrine should also apply where a discharge in bankruptcy is relied upon.

(a) One of the main purposes of the bankruptcy stat-

ute like that of statutes of limitations is the quieting of litigation with respect to debts within the scope of such statutes and the relief of such debtors.

(b) Such a result was reached in the *Kreitlein* case although without reference to the analogy to the case where the statute of limitations is pleaded — the court holding that "the introduction of the order makes out a *prima facie defense*" (note that this Court used the word *defense* rather than the word *evidence*).

F. The creditor in the case at bar must rely upon the exception created by clause (3) of Section 17 of the Bankruptcy Law in order to avoid the effect of the operation of the debtor's discharge in bankruptcy. That clause clearly creates only one class of debts which may be so excepted.

G. "In view of the well known purposes of the Bankruptcy Law, exceptions to the operation of a discharge should be confined to those plainly expressed."

Gleason v. *Thaw*, 236 U. S. 558, at 562.

H. This Court, in the *Kreitlein* case, has definitely established that the burden is upon the creditor to show that "the debt sued upon was by law excepted from the operation of the discharge".

I. Not all, but only certain, unscheduled debts are thus excepted by clause (3) from the operation of a discharge. See *Delta County Bank* v. *McGranahan*, 37 Wash. 307, 309. In order to bring a debt within the class excepted by said clause (3) from the operation of a discharge at least four distinct facts must appear, viz.: —

(1) That the debt was not duly scheduled in time for proof and allowance with the name of the creditor;

(2) That the creditor's name was known to the bankrupt;

Morency v. *Landry*, 79 N. H. 305, 108 Atl. 855;
Steele v. *Thalheimer*, 74 Ark. 516;

(3) That the creditor had no notice, and

(4) That the creditor had no actual knowledge of the bankruptcy proceedings.

Laffoon v. *Kerner*, 138 N. C. 281.
Manheim v. *Loewe*, 173 N. Y. Supp. 260.
Re Peterson, 121 N. Y. Supp. 738; 137 App. Div. 435.
Thompson v. *Caverley*, 148 Ill. App. 295 (semble).

J. The burden being upon the creditor in the case at bar to show that the debt sued upon came within the class of debts excepted by clause (3) from the operation of the discharge, and there being at least four essential facts which must appear in order to bring a debt within said clause (3), it follows that the creditor has the burden of establishing or at least of going forward with the evidence to establish each of those four essential facts, and he certainly cannot be held to have sustained that burden by showing, as in the case at bar, only one of those facts.

(1) In the case of *Morency* v. *Landry, supra*, it appeared that the debt was not scheduled under the name of the creditor, J. A. Morency, but no evidence was offered as to whether the bankrupt knew Morency's relation to him as a creditor. The court held that the Bankruptcy Law as construed by this Court imposed upon the creditor the burden of showing that the bankrupt knew Morency's relation to him as a creditor. It should also be noted that, although the lower court in that case *had found* that the creditor *had actual* knowledge, yet

the validity of that finding was one of the questions which was also apparently open on the appeal and the New Hampshire Supreme Court expressly left that question out of consideration and ignored that finding, saying that their conclusion on the question of burden of offering evidence as to the debtor's knowledge of the creditor's name rendered it "unnecessary to consider whether the mailing of notices to F. Morency and F. Morency & Co. authorized the finding that J. A. Morency (the creditor) had actual knowledge of the proceedings".

(2) In the Peterson case (*supra*) the question was whether, a discharge in bankruptcy having been shown, it was necessary for the debtor to show that the claims were *not* excepted from the operation of the discharge and the court, in holding that such burden was *not* upon the debtor but upon the creditor, said: "'In order to defeat the discharge . . . the burden was upon the plaintiff (the creditor) to establish by sufficient evidence and an appropriate finding that its claim was one of those excepted from the effect of a discharge.' . . . If the appellants (the creditor) claimed their debts were excepted because not properly scheduled, *and* they had no notice or knowledge . . . they had the burden of showing the *facts* upon which their claim rested."

(3) In the case of *Manheim* v. *Loewe* (*supra*), action was brought upon two promissory notes which came due in 1908. The debtor produced a certified copy of his discharge in bankruptcy which had been granted him in 1912 and rested. No evidence was offered either as to the schedules or as to notice and the court held that "the burden of proof was upon the creditors to show that their claim was

not properly scheduled *and* they did not have notice of the bankruptcy proceedings."

(4) In the cases of *Laffoon* v. *Kerner* (*supra*), *Larsen* v. *Hyman*, 126 N. Y. Supp. 100, and *re Peterson's Est.*, 124 N. Y. Supp. 907, the debtor in each instance rested after having proved his discharge in bankruptcy, and there was no evidence either as to the schedules or as to notice and the court, in making the same holding as in *Manheim* v. *Loewe* (*supra*), used substantially the same language as that quoted in the preceding paragraph.

(5) In so far as the opinion in the case of *Bailey's Adm.* v. *Gleason*, 76 Vt. 115, is contrary to rules laid down in the cases above referred to, it must be considered as in effect overruled by the *Kreitlein* case. The Vermont case, although recognizing the general rule that the burden is not upon the debtor to show that the debt is not within any of the excepted classes and that it is for the creditor by his replication to bring the debt within some exception, nevertheless attempts to attribute a different character to the class of debts covered by clause (3) and establish an exception as to that class from such general rule by holding in effect that a debtor in pleading a discharge in bankruptcy must also make such allegations as will show either that the debt was duly scheduled or that the creditor had knowledge of the proceedings. In the *Kreitlein* case not only did this Court say that, upon the introduction by the debtor of the order for discharge, the burden is "then cast upon the plaintiff (the creditor) to show that, because of *failure to give notice* or other statutory reason, the debt sued upon was by law excepted from the operation of

the discharge", but this Court also pointed out that the debtor in that case had *unnecessarily* offered in evidence the schedule to show that the creditor was listed.

(6) That the burden should be on the creditor to establish *all* the facts necessary to bring his claim within the class of debts excepted by clause (3) from the operation of the debtor's discharge in bankruptcy, would seem to follow from the principle laid down in the case of *Marsteller* v. *McClean*, 7 Cranch. 156, where it was held that a plaintiff who sought to avoid a plea of the statute of limitations must set forth in his replication "a full and complete answer to the bar". In that case the time prescribed by the statute of limitations was five years. The plaintiff was a feme covert at the time the cause of action. The Court held the replication bad because it did not *also* allege that that plaintiff had continued a feme covert until within five years of the date when suit was brought.

K. That the burden should be upon the creditor to show that his claim is excepted by law from the operation of the discharge is the obvious conclusion from a study of the history and purposes of the Bankruptcy Law as shown in the various decisions of this Court construing said Law.

(1) The policy of the Bankruptcy Law "was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities and enable him to take a fresh start". The decisions of this Court "lay great stress upon this feature of the law".

Stellwagen v. *Clum*, 245 U.S. 605 at 617.
Traer v. *Clews*, 115 U.S. 528 at 541.

Burlingham v. *Crouse,* 228 U. S. 459 at 473.
Wetmore v. *Markoe,* 196 U. S. 68, 77.

(2) The rule thus established, placing the burden on the creditor to show that his claim is excepted from the operation of the discharge, is "consonant with equity and consistent with the object and intention of Congress in enacting" the Bankruptcy Law. "A different construction would be inconsistent with the liberal spirit which pervades the entire bankruptcy system."

cf. *Neal* v. *Clark,* 95 U. S. 704 at 709.

(3) The purpose of Section 17 of the present Bankruptcy Law was to confer upon creditors the *benefit* of having certain classes of debts excepted from the operation of the discharge.

Friend v. *Talcott,* 228 U. S. 27 at 38–40.

(4) Clause (3) of said Section 17 is devoted to defining only one class of debts which are excepted from the operation of a discharge. In defining that class it starts in by referring to a general class of debts, *i. e.*, debts not scheduled with the name of the creditor, but then it limits that general class by adding the two qualifications or exceptions, first, that the name of the creditor must be known to the bankrupt and second, that the creditor must have had no notice or actual knowledge of the bankruptcy proceedings. Unless those exceptions are negatived clearly the debt cannot be said to have been brought within the class of excepted debts created by said clause (3).

(5) It is a well established rule of statutory construction that where a statute creates a right or rights and certain exceptions are made in the clause creat-

ing such rights, the burden is upon the party claiming such a right not only to plead the statute but also the facts negativing the exception.

Black, Interpretation of Laws, p. 429.
Sedgwick, Construction of Statutes and Constitutional Law, 2nd Ed. pp. 50, 93.
Potter's Dwarris on Statutes, p. 119.
Lewis' Sutherland, Statutes and Statutory Construction, 2nd Ed. Sec. 351 (p. 671).

(a) In our case the debtor having pleaded and proved his discharge in bankruptcy, such a plea being a plea in bar, the burden is upon the creditor to establish that his debt is excepted by law from the operation. To do so he must rely on clause (3) of Section 17 and claim thereunder his right to recover against the debtor. But the clause of the statute creating his right contains certain exceptions. Under the well established rule above cited he has not established that his debt comes within the class of debts excepted by clause (3) from the operation of the discharge until he has pleaded or shown the facts negativing the exceptions contained in clause (3) — to wit, the debtor's knowledge of the creditor's name *and* the creditor's lack of notice or actual knowledge of the bankruptcy proceedings.

(b) It is a well established rule of evidence that where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative.

10 Ruling Case Law, Evidence, Sec. 49.
Freeman v. *Blount*, 172 Ala. 655.

II.

The trial Court erred in finding that the creditor was entitled to recover against the debtor in this case and in entering final judgment pursuant to such finding.

A. There being only one class of debts excepted by clause (3) of Section 17 from the operation of the discharge and the burden being upon the creditor to show that his debt came within that class, the trial Court making that finding must have presumed,

(1) That the debtor knew the name of the creditor and knowingly failed to schedule the debt in that name;

(2) That the creditor had no notice, and

(3) That the creditor had no actual knowledge of the proceedings in bankruptcy.

B. The first of such presumptions is clearly improper in this case.

(1) Such a charge must be proved by the party making it (the creditor), for a person shall be presumed innocent until he is proved guilty.

10 Ruling Case Law, Evidence, Sec. 49.
1 Greenleaf, Evidence, Secs. 78, 81.

(2) The record in this case does not furnish evidence sufficient to warrant any such finding. The debtor merely failed to schedule the name of the creditor. There is no evidence that he knew the creditor's name. It does not even appear that the debt was not scheduled, and it might well have been the fact in the case at bar that, as this Court pointed out in the *Kreitlein* case, the debt was in fact scheduled in the form of a liability "rather than as a judgment into which the liability had been merged".

C. Such presumptions are contrary to the spirit and purpose of the Bankruptcy Law.

(a) The provision of the law relating to the discharge of bankrupts should *not* be construed against the bankrupt nor should all implications and doubts be resolved against him, for the release of the unfortunate and insolvent debtor from the burden of his debts and his restoration to business activity in the interest of his family and of the general public is one of the main, if not the most important, objects of the law.

Hardie v. *Swafford Bros. Dry Goods Co.*, 165 Fed. 588 (C. C. A. 5th Cir.)

See also *Burlingham* v. *Crouse*, 228 U. S. 459 at 473.

" " *Wetmore* v. *Markoe*, 196 U. S. 68 at 77, where the Court said: "The Bankruptcy Law should receive such an interpretation as will effectuate its beneficent purposes. . . ."

D. Such presumptions are contrary to the Bankruptcy Law itself.

(a) As pointed out above, Section 17 confers upon the creditor the benefit of certain exceptions and therefore has been construed as placing upon the creditor the burden of bringing his debt within one of the classes therein described. In the case at bar the creditor must bring his debt within clause (3) of Section 17 and it follows that it must be his duty to prove, or at least go forward with the evidence to show, the facts necessary to negative the exceptions *contained* in said clause (3). Therefore it must be held to be contrary to the Bankruptcy Law for any court to presume, in favor of the creditor, merely from the fact that the creditor's name did not appear in the schedules, any of the other

three facts which the creditor must also show in order to make out his case, *i. e.*, to show that his debt is excepted from the operation of the discharge. To hold otherwise would in effect be a denial of the rule that the burden was upon the creditor to bring his debt within the excepted class, for to bring it within that class (if relying on said clause (3)) at least four distinct facts must appear (see paragraph *I* under Division B on pages 11-12 above) and it certainly would be taking two inconsistent positions to hold that the burden is upon the creditor to bring his debt within a class to do which at least four essential facts must be made to appear, and then at the same time hold that the creditor need offer evidence of only one of those facts and that the other three essential facts may be presumed from that one fact.

E. The presumption, if any, in the case at bar, is that the creditor *did* have notice or actual knowledge of the bankruptcy proceedings.

(a) Section 21 f of the Bankruptcy Law creates a statutory presumption as to the regularity of the proceedings, and it has been held that under this section it would be presumed that the debts were property scheduled *and* that the creditors had notice.

Re Peterson, 121 N. Y. Supp. 738 at 740; 137 App. Div. 435 at 438.

(b) Where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, the presumption arises that his testimony if introduced would be adverse to his contention.

10 *Ruling Case Law, Evidence*, Secs. 36 and 53, and cases cited.
West v. *Kern*, 88 Ore. 247.

(c) In this case the material fact was a negative fact. If the creditor had no notice or actual knowledge of the bankruptcy proceedings no one could know that fact better than the creditor himself. Such a negative fact was peculiarly within the knowledge of the creditor. If he had had no such notice or actual knowledge he could easily have testified to that effect. It is, therefore, only the natural and fair presumption that he in fact did have such notice or actual knowledge else he would have denied it. (In this connection it must be borne in mind that nothing in the creditor's Affidavit of No Defense appearing on page 7 of the Transcript of Record can be considered as evidence in favor of the creditor in this case — see Massachusetts Acts of 1911, c. 305 (in force at the time of the trial). Nor is such an affidavit a pleading. It is merely a statement of reasons which a plaintiff, desiring a speedy trial, may file and is considered only on the question of whether the case should be advanced on the trial list. Furthermore the bill of exceptions shows that it was not considered by either the Superior Court or the Supreme Judicial Court of Massachusetts.)

(d) That there should be such a presumption of notice or actual knowledge would seem to be so even if this Court should, following the reasoning of the Massachusetts Supreme Court in the case at bar, rule that the ultimate burden of *proof* was upon the debtor to show that the debt sued upon was discharged, for this Court in the case of *Selina*,

Rome and Dalton R. R. v. *U. S.*, 139 U.S. 560 at 567, has established an important exception to such a general rule as to burden of proof where, from the very nature of the question in dispute, the evidence that could be adduced respecting it (the fact to be established) must be in the possession of, or easily attainable by, one of the contending parties, who accordingly could at once put an end to the litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established "as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies peculiarly within his knowledge, or of which he is supposed to be cognizant".

(e) In view of the presumption created by Section 21 f as to the regularity of the proceedings it must be held in the case at bar that the notice of the first meeting of creditors was duly published as provided by Section 58 b of the Bankruptcy Law. Therefore, in view of the creditor's failure to deny, either in his pleadings or by his testimony, that he had no notice or actual knowledge of the proceedings, it would be the natural and reasonable presumption that, having had at least constructive notice through such publication, he had had "notice" within the meaning of that word as used in Clause (3) of Section 17. And right here it should be noted that Congress in enacting the Bankruptcy Law apparently did not see fit to qualify or limit the word "notice" in that Clause (3) although it did qualify

or limit the word "knowledge" in the same clause to "actual knowledge".

C.

THERE APPEARS TO BE A CLEAR CONFLICT BETWEEN THE DECISIONS OF STATE COURTS AS TO THE QUESTIONS RAISED IN THE CASE AT BAR.

I.

The cases supporting the view that the burden is upon the creditor to show *all* the facts necessary to bring his debt within the class excepted by Clause (3) of Section 17 from the operation of the debtor's discharge in bankruptcy appear to have been based upon sounder reasoning and are more consistent with the purpose of the Bankruptcy Law than the cases opposed to that view.

A. It is submitted that the case of *Morency* v. *Landry*, 79 N.H. 305, 108 Atl. 855, is the best considered and soundest of the various State court cases in which the question of burden of proof under clause (3) of Section 17 is considered, and is a direct authority (although the facts are not on all fours with those in the case at bar) to the effect that the burden is upon the creditor to show *all* the facts necessary to bring the debt within the class of debts excepted by said clause (3) from the operation of a discharge.

(1) In that case the creditor was the payee of a note which had been signed by the debtor, which note had been discounted at a bank, and the bank having recovered judgment against both the creditor and debtor the creditor had paid the judgment in 1902. In 1906 the debtor went into bankruptcy and in 1912 received his discharge. About 1918 the creditor filed his claim against the estate of the debtor, then deceased. The debtor's discharge having been shown, it appeared that the creditor's name did not appear in the debtor's schedules but

there was no evidence as to whether the debtor knew the creditor's relation to him as a creditor. The court after citing the case of *Stellwagen* v. *Clum*, 245 U. S. 605, at 617, as to the purpose of the Bankruptcy Law and the *Kreitlein* case, expressly held that the Bankruptcy Law, as construed by this Court, imposed upon the creditor the burden of offering evidence tending to show that the debtor, when he filed his petition, knew the creditor's relation to him as a creditor.

(2) Furthermore the court expressly declared that in view of that conclusion it was unnecessary for it to consider whether the evidence in the case authorized the finding, which the lower court had made, that the creditor had actual knowledge of the proceedings.

B. In each of the following cases the court in its opinion clearly points out that the burden is upon the creditor to allege or show, not only that the debt was duly scheduled with the name of the creditor, but also that the debtor knew either the facts necessary to enable him to so schedule it or that the creditor had no knowledge of the bankruptcy proceedings, or both.

(1) In *Steele* v. *Thalheimer*, 74 Ark. 516, the court, in holding that the creditor was barred by the debtor's discharge in bankruptcy notwithstanding the creditor's contention that he had no notice and that his address had not been correctly given, said: "The act . . . excepts only those (debts) which have not been duly scheduled in time . . . with the name of the creditor, if known to the bankrupt . . , besides it is not alleged or shown that the bankrupt knew the address of the creditor, or that the failure to give his correct address was intentional or fraudulent."

(2) In *Laffoon* v. *Kerner*, 138 N. C. 281, the court says: "The creditor may notwithstanding (the discharge) show that his debt is of the excepted class. The onus, however, is on him and if he fails to make the proof, the debt will be taken to (be) one of an ordinary character. . . ." The court after disapproving one of its early decisions (*Balk* v. *Harris*, 130 N. C. 381) in so far as that decision said that the debtor must show that the debt was scheduled *or* that the creditor had notice, goes on to say: "We are of the opinion that the burden was upon the plaintiff (the creditor) to show that his debt was not scheduled *and* that he had no notice of the proceedings in bankruptcy."

(3) In *Manheim* v. *Loewe*, 173 N. Y. Supp. 260 (185 App. Div. 601), the court, after disapproving *Graber* v. *Gault*, 93 N. Y. Supp. 76, 103 App. Div. 511, and referring to *Hyde Park Flint Bottle Campany* v. *Miller*, 179 App. Div. 73, as being inconsistent with the *Kreitlein* case, said: ". . . the burden of proof is upon the creditors to show that their claim was *not* properly scheduled *and* they did not have notice of the bankruptcy proceedings."

(4) In *Bank of Lafayette* v. *Phipps*, 101 S. E. 696 (Ga. App.), the court held that there was no error in directing a verdict for the debtor who had introduced a certified copy of his discharge in bankruptcy, ". . . there being no insistence upon the part of the plaintiff (the creditor) that it did not have notice or actual knowledge — or that the debt and the name of the creditor were not scheduled".

(5) In *Re Peterson*, 121 N. Y. Supp. 738; 137 App. Div. 435, the court in determining the question whether it was necessary for the debtor to show

that the debts were not excepted from the operation of the discharge, and there being no proof as to the schedules or notice, said: "If the appellants (creditors) claimed their debts were excepted because not properly scheduled *and* they had no notice or knowledge — they had the burden of showing the *facts* upon which their claims rested."

(6) In *Alling* v. *Straka,* 118 Ill. App. 184, the court said: ". . . If the debt sued on falls within one of the exceptions of the bankruptcy act it is a matter of reply for the plaintiff (the creditor) to make. The burden is upon her to prove it. The burden of proof should follow the pleadings."

C. None of the decisions in the cases cited by the Massachusetts Supreme Court as supporting its opinion in the case at bar appear to have been based upon any consideration of the history or purposes of the Bankruptcy Law as heretofore set forth and referred to by this Court in the cases heretofore cited in this brief.

(1) In *Wineman* v. *Fisher,* 135 Mich. 604, the court in holding that the debtor had the burden of proving that the creditor had no notice or knowledge where it appeared that the debt was not scheduled, apparently based its opinion entirely upon Potter's Dwarris, Statutory Const. 119; Sedgwick, Statutory Construction, 2nd ed. p. 93, and 1 Chitty Crim. Law, p. 223, evidently proceeding upon the theory that the purpose of Section 17 of the Bankruptcy Act was to confer upon or grant to a debtor the benefit of having certain of his debts discharged as a result of his bankruptcy proceedings. That such a theory is unsound is clear from the opinion of this Court in the case of *Friend* v. *Talcott, supra.* In the *Talcott* case this Court pointed

out that the purpose of Section 17 was to confer upon certain creditors the right or benefit of having certain debts excepted from the operation of the discharge. That being so the citations in the *Wineman* case would seem to be directly contrary to the holding for which they are cited, for they declare that where a statute creates a right or rights and certain exceptions are made therein, the burden is upon the party claiming such a right to negative such exceptions.

(2) The case of *Armstrong* v. *Sweeney,* 73 Neb. 775, was a proceeding brought by the debtor to restrain the sale of his goods on execution. In his petition he alleged not only the discharge but also that the creditor had knowledge of the bankruptcy. The court, in holding that the debtor had not established that the creditor had knowledge apparently based its decision upon the pleadings in the case, saying: "The burden of proof was upon the plaintiff to sustain the allegation of his petition that Hall (the creditor) had knowledge of the bankruptcy proceedings in time to prove his claim." No citations were given, and there was no reasoning in the opinion indicating how the court arrived at its conclusion.

(3) In *Collins* v. *Crews,* 3 Ga. App. 238, the debtor had alleged in his answer that the creditor had actual notice of the proceedings, and in holding that the debtor had failed, on the evidence, to prove such notice, said: "The defendants (the debtors) ***having assumed the burden*** (of proving notice) the issue in the case turned on whether they could disprove the testimony of Crews and show that Crews had knowledge." No authority was

cited and here again the question as to burden of proof apparently was made to depend upon the pleadings.

(4) The case of *Sloan* v. *Grollman*, 113 Md. 192, was a proceeding by the debtor to restrain the enforcement by the creditor of a judgment. It appeared that the creditor's debt had not been scheduled. The complainant, the debtor, alleged that he had personally notified the creditor by mail but the creditor denied the allegation. The court, in holding that the debtor had not sustained the burden of proof, without apparently any consideration of the history or purposes of the Bankruptcy Act or the decisions of this Court with respect to it, based its decision upon the authority of the three preceding cases.

(5) The various Texas cases that appear to support the creditor's position in the case at bar are based on a line of decisions in that state which preceded the *Kreitlein* case and held, contrary to the *Kreitlein* case, that the burden was upon the debtor to show that the debt did not come within any of the exceptions to the operation of the discharge.

(6) The opinion in *Calmenson* v. *Moudry*, 137 Minn. 123, is based upon the preceding cases and the case of *Bailey's Adm.* v. *Gleason*, *supra*, which as pointed out above (see p. 14 of this brief) must be considered as in effect overruled by the *Kreitlein* case. The court merely states its conclusion without any reasoning, much less any consideration of the Bankruptcy Law as construed by this Court.

D. The cases of *Miller* v. *Guasti*, 226 U. S. 170, and *Birkett* v. *Columbia Bank*, 195 U.S. 345, are not helpful in the case at bar for in those cases the decisions, as pointed

out in the *Kreitlein* case, were based on extrinsic proof and on express findings that the debtor knowingly failed to properly schedule the debt and also that the creditor did not have notice or actual knowledge of the proceedings prior to the discharge of the bankrupt therein.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE GRANTED AND A WRIT OF CERTIORARI ISSUED AS PRAYED FOR.

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